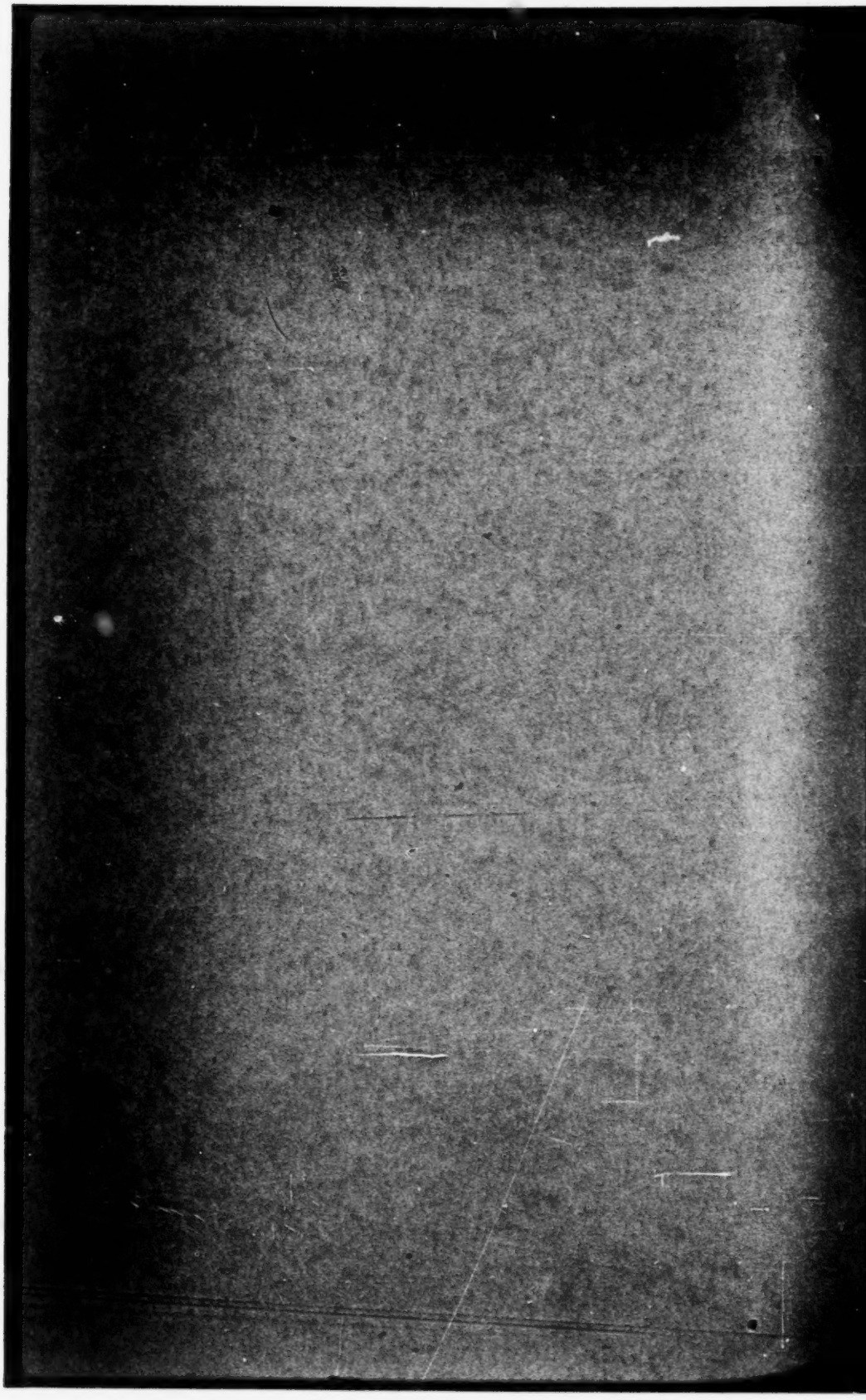

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No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

Appeal From the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

APPELLANTS' PETITION FOR REHEARING ON THE MERITS

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AUTHORITIES CITED

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Grayburg Oil Co. v. Powell, 118 Tex. 354.

Grocers' Fruit Growing Union v. Kern County, 150 Cal. 466.

Kentucky Finance Corp. v. Paramount Auto Exch., 262 U. S. 544.

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Liggett v. Baldridge, 278 U. S. 105.

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McClung v. Pulitzer Pub. Co. (Mo.), 214 S. W. 193.

Merrimac Veneer Co. v. McCalip, 129 Miss. 671.

Patsone v. Pennsylvania, 232 U. S. 138.

Pool v. Pickett, 8 Tex. 122.

Power Mfg. Co. v. Saunders, 274 U. S. 490.

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389.

Railroad Com. v. E. T. R. Co., 264 U. S. 867.

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Truax v. Corrigan, 257 U. S. 312.

T. & N. O. R. R. Co. v. Miller, 221 U. S. 406.

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To The Honorable Supreme Court of the United States:

Appellants respectfully move the Court to set aside the judgment of affirmance herein and to reverse the case on rehearing, because they believe the judgment and opinion of the Court demonstrably erroneous. It is well known that the eminent Justice who delivered the Court's opinion herein entertains, and has consistently advocated, more tolerant views with respect to the permissible scope of state action under the Fourteenth Amendment than have the majority of this Court. Obviously, we believe, those well-known views have been permitted to control the decision in this case, contrary to the frequently expressed views of a majority of the Court. This we shall undertake to demonstrate by at least three opinions of this court, each rendered within

the past three years, which we earnestly submit are in principle conclusive against the validity of the statute here questioned and against the stated views of the Court in support of its validity. The Court's opinion herein is in harmony with the views expressed by Mr. Justice Holmes in his dissenting opinions in the three cases mentioned, but inconsistent with the majority opinions therein.

* * * *

We submit that the subjoined proposition is supported by authority of this Court's opinions and should control the decision in this case.

PROPOSITION

The Fourteenth Amendment guarantees to citizens of the United States not only equal protection of laws, but the protection of equal laws. When that right has been denied a member of a class to his injury by the application of a state statute discriminating against the class to which he belongs, and the discrimination is apparent, the statute must fall under the Fourteenth Amendment unless the classification rests upon some real and substantial difference between the offended class and others similarly situated pertinent to the very subject matter of the legislation. Mere difference is not enough, nor will a mere conjecture that the difference between the classes bears or may bear a reasonable relation to the subject matter of the legislation suffice to save the offending statute. Liggett vs. Baldridge, 278 U. S. 105.

As we read the Court's opinion, the present decision rests upon two propositions, each of which, in our opinion, is in conflict with applicable principles of law heretofore stated by this Court, viz:

1.

That state procedural statutes are beyond the reach of the Fourteenth Amendment, and that the Federal Constitution is concerned only with the protection of fundamental rights, and

2.

Upon the *conjectural* hypothesis that "there is likely to be such a difference between the business done by a corporation and that done by a private person" as will support the separate and more burdensome classification of corporations from individuals for purposes of venue.

* * * *

The opinion of the Court correctly declares that in the creation of permissible classifications by statute "the range of the State's discretion is large," but however broad that range may be it is clearly limited by the often stated principle that "a classification to be consistent with the equal protection clause must be based on *a real and substantial difference having reasonable relation to the subject of the legislation.*" *Quaker City Cab Company vs. Pennsylvania*, 277 U. S. 389.

The question before the Court for decision is well stated thus:

> "In deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than is fixed for private citizens, we have to consider * * * whether the difference does injustice to the class generally;"

but we cannot assent to the application here of the proposition involved in the further statement in the Court's opinion that—

> "The question seems to be answered by Cincinnati Street Ry. Co. vs. Snell, 193 U. S. 30, 36, 37, which lays down that if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded."

This Court itself refused to so apply it in a similar situation in the recent case of *Power Manufacturing Company vs. Saunders,* 274 U. S. 490. There the appellees sought to sustain a discriminatory Arkansas venue statute upon express authority of the Snell case and upon the very principle found therein as above quoted; but the Court there clearly distinguished the Snell case insofar as it seemed to assert immunity of procedural statutes from the reach of the Fourteenth Amendment. The reasons why the Court in the Saunders case refused to be bound by the above principle announced in the Snell case and here relied on to sustain the statute in question are so clearly and vigorously stated in the Saunders opinion by Mr. Justice Van Devanter that it is inconceivable to us that the Court advisedly

consented to rest its present decision upon the Snell case in whole or in part. We believe simple justice to the Court requires that the language of Mr. Justice Van Devanter in the Saunders case in distinguishing the Snell case should here be set out at length, which we do:

> "The case of Cincinnati Street R. Co. vs. Snell, 193 U. S. 30, 48 L.Ed. 604, 24 Sup. Ct. Rep. 319, is cited as if venue provisions were there held to be beyond the reach of the equal protection clause. *But this is a strained and inadmissible interpretation.* That was an action by an individual against a corporation which was begun, conformably to a general statutory requirement, *in the county where the defendant had its principal office and was engaged in business.* Another statute authorized the court to change the venue in such an action 'to the adjacent county most convenient to both parties' if it appeared that the corporation had more than fifty local stockholders, and if it was also shown by the affidavit of the other party, supported by five credible citizens, that he could not have a fair and impartial trial in the county where the suit was begun. A showing was made which brought the case within the statute; and the court changed the venue over the defendant's objection that the statute operated unequally and was invalid in that it permitted the other party but not the corporation to secure the change. The statute doubtless proceeded on the assumption, first, that a corporation with many local stockholders might have such influence in the county that the other party would be at a serious disadvantage, unless provision were made whereby the court, on an adequate showing, might change the place of trial to another county free from such

> influence and as convenient as might be to both parties, and secondly, that the corporation was not likely to suffer any prejudice in its home county through having many stockholders there. At all events the difference in the situation of the parties and the relation of that difference to the matter of changing the place of trial were such that it could not be said of such discrimination as was shown in the statute that it was without a reasonable and adequate basis. *The opinion affirmatively shows that the defendant was not objecting to the place designated by the court for the trial, but only that the statute did not accord it an equal opportunity to secure a change from the county where the action was begun.* When the opinion is examined with the actual situation in mind it has little bearin on the case now before us." (Italics ours).

And we say with the court that when the Snell case, here relied upon to sustain the statute, is examined with the actual situation in mind, it has as little bearing on this case as it was held to have in the Saunders case.

While yet discussing the Saunders case, we cannot refrain from observing that the writer of the Court's present opinion there declared in his dissenting opinion that while a foreign corporation merely doing business in a state and having its works elsewhere would necessarily be inconvenienced to a certain extent by being sued anywhere away from its headquarters, that "the difference to it between one county and another is likely to be less than it will be *to a corporation having its headquarters in the state.*" (Italics ours). In that view we fully concur, and believe the fact suggested offers an

additional argument in support of the invalidity of the statute now before the court.

The case of *Louisville & Nashville R. R. Co. vs. Barber Asphalt Co.*, 197 U. S. 430, but states the principle that one cannot complain that a statute is unconstitutional, because discriminatory, unless the discrimination injuriously affects the class to which he belongs as distinguished from a particular injury to himself from the operation of the statute complained of. And *Patsone vs. Pennsylvania*, 232 U. S. 138, but holds that a non-member of the class alleged to be discriminated against cannot take advantage of such discrimination. When so understood, those cases have no particular pertinency to a decision of the merits of this case, but only state the rules applicable to ascertain under what conditions a complaint of discrimination is available to a person who claims to be injured thereby. Hence those cases will not be noticed further.

In common with most states, Texas has declared it to be the general policy of the law that defendants are privileged to insist on being sued in the counties of their domiciles. As said by the Supreme Court of Texas in *Pool vs. Pickett*, 8 Tex. 122, that rule "has always been regarded as just in itself and *eminently advantageous to defendants*, for whose benefits it was intended." (Italics ours.) By the statute in question the valuable privilege accorded by the general policy of the law to all defendants is withdrawn from an important and ever increasingly important class of citizens of the United

States. That is a discrimination. Is it arbitrary or is it based on some reasonable difference between the classes so established pertinent to the very subject of venue of actions? On this subject Judge Smith of our San Antonio Court of Civil Appeals in *Southern Union Ins. Co. vs. Pesek*, 22 S. W. (2d) 1090, (after our Supreme Court had sustained the validity of the statute) said:

> "This discrimination sought to be created by the exception between the corporation and the individual is of course obvious, for by the terms of the statute the one is denied, while the other is vouchsafed, the very valuable privilege of litigating causes of action asserted against it, or him, in the county of its or his domicile. As the domicile of the domestic corporation is just as certainly and definitely fixed and ascertainable, in a particular county of the state, as is that of the citizen, and, as either is just as easily reached, served, and haled into court in the county of such domicile as the other, the writer is unable to perceive any rational basis for the frank discrimination, with relation to the subject of venue of suits."

We believe that argument unanswerable. Under the facts conclusively found by the Court of Civil Appeals, Bain Peanut Company of Texas had its domicile in Tarrant County, Texas. R. 10. Not only so, but none of the other exceptions to the rule of general venue of actions in the county of a defendant's domicile existed in the case, R. 10, the plea of privilege being conclusive of the facts therein alleged under our law unless successfully challenged by sworn plea and proof, which is

not the situation here. It is further true that appellees both resided in Comanche County, R. 1. Thus Bain Peanut Company, over its proper objection, was required to litigate in a county which the law assumes to have been favorable to appellees—among their neighbors—and in a county in which it was not domiciled, had no office, agency, or agent,—and why? *Solely because it was a corporation,* not because it was a particular kind of corporation and not because of the character of business it did or had done, for an individual or the members of a partnership engaged in the identical business, and having committed the identical alleged breach of contract in that county could not have been sued there over proper objections. Since Bain Peanut Company, a corporation, could only do business through agents and had no agents in Comanche County, it was obviously necessary for it to take the deposition of or carry its agents who were involved in the alleged breach of contract to that county as witnesses. That fact, as suggested in *Power Mfg. Co. vs. Saunders,* supra, necessarily entailed some additional expense. Fort Worth, where Bain Peanut Company was domiciled and its managers resided (R. 1), is the county site of Tarrant County, as the town of Comanche is of Comanche County. The distance between those points is 106 miles by rail and slightly more by highway. That fact is not alleged or proven, but is true, which fact is judicially known to the Court as it was so judicially known in *Carroll vs. The United States,* 267 U. S. at p. 160, that "Grand Rapids is about 152 miles from Detroit." Both facts are matters of geographical location

and can be ascertained with equal facility from the sources from which such judicial knowledge is in fact derived, namely, published maps and general geographical knowledge and sources. Hence it is clear that not only as a member of a class but as an individual representative of such class did Bain Peanut Company suffer injury in this case by the operation of the statute in question; and the discrimination is real and substantial. There are more than 250 counties in Texas. Galveston and Amarillo, for instance, are 775 miles apart. If this statute is upheld corporate defendants may be sued and forced to defend, as they often have been in fact, from 500 to 700 miles from their domiciles under it, while private citizens identically situated labor under no such immensely burdensome handicap. It but remains to determine whether the discrimination can be justified upon any difference between corporations and individuals relevant to the matter of venue of actions.

That question must be answered in the light of the fact that the questioned statute, as construed and here applied, relates to all private corporations as a class regardless of the character or extent of their business, subjecting them to suit in any of the 265 counties of the state where a cause of action or a part of it arises; and where, as in this case, such onerous venue rests exclusively upon an application of the statute, the county of venue *must* be one in which the corporation is not domiciled and in which it has no established agency or agent. Therefore, in every case in which venue necessarily depends alone upon an application of the exceptional provision of our venue statute here consid-

ered, every fact exists to establish *prima facie* a burden incident to the defense of such suit not imposed upon individual defendants identically situated. Then is the difference alone between a corporation and an individual sufficient to justify such discrimination? And is a mere *conjecture* that—

> "There is likely to be such difference between the business done by a corporation and that done by a private person that the state may well take it into account when it permits a corporation to be formed"

sufficient—or any—evidence that such difference in fact does exist or, if so, that such difference is pertinent to the matter of venue of actions against corporations? The language just quoted from the Court's opinion projects the issue into the realm of conjecture, suggests the *possibility* of difference pertinent to that issue but facts indicative of such conjectural differences are noticeably lacking. What then are the differences between "the business done by a corporation and that done by a private person?" The principles underlying the successful operation of business, whether done in private or corporate form, are of universal application. Does the Court suggest a possible difference in business morals or ethics between the conduct of private and corporate business? To do so is to indict our whole business fabric, for notoriously the overwhelming bulk of all business is now done in Texas as elsewhere by corporations, and the tendency is constantly increasing. The corporation statutes of Texas now provide 88 separate purposes for which corporations may be organized. Taking into consideration that under such general permissible purposes

as "manufacturing" or "merchandising" any relevant business may be conducted, it is both true and obvious that practically every known lawful business—except practice of the learned professions—may be and is in fact conducted in Texas, as in most states, by corporations. Do the conjectured differences between private and corporate business relate to their comparative sizes? That difference might be pertinent to the visitatorial and regulatory powers which a state may deem advisable to exercise over its corporate citizens, but certainly not to venue of actions between litigants, some of whom happen to be corporations. Such difference so considered is certainly factitious and inadmissible. Is the fact that a corporation must transact business by agents one of the suggested differences? If so, individuals likewise may, and in fact often do so. The law knows no distinction in the rules of agency as between the agents of individuals and those of corporations, nor of the legal incidents of those rules. The controlling principles of agency are identical, whether that relationship exists between individuals and corporations or solely between individuals.

If, as suggested by the Court, the difference between business done by private citizens and corporations is conceivably relevant to the matter of venue of actions against corporations, we submit that our venue statute itself makes suitable provision for those differences at every point where the same may be pertinent to the subject. For instance, in addition to the challenged portion of Section 23 of Article 1995, that section also provides that corporations in general may be sued in

the county of their domiciles as well as in any county in which they have "an agency or representative." We cannot agree with appellees that the invalidity of such provision follows from the invalidity of the provision here questioned. Corporations must transact business through agents. Where a corporation has an agency or maintains a representative, it may be well said, in view of its purely legal character, that where the agency or established representative of a corporation is, there the corporation is also; hence those provisions do not offend against the general principle which permits defendants to be sued in the counties of their domicile. Section 23 further provides that railway corporations and their receivers, assignees or trustees, may be sued "in any county through or into which the railroad of such corporation extends or is operating." Section 25 provides that actions for personal injuries against railroad corporations, the receivers, assignees or trustees thereof, may be brought in the county in which the injury occurs or in the nearest county to that of the residence of the plaintiff in which the corporation runs or operates its road, or has an agent. Those exceptional provisions are obviously pertinent to such actions if not to the character of business conducted by railway corporations. Section 28 provides a different and pertinent venue for suits by mechanics and laborers against railway corporations for unpaid wages. Section 28 provides for still different, yet clearly pertinent, venue with respect to actions against various kinds of insurance corporations, when such actions relate to or arise out of contracts of insurance issued by them. Our venue statute

is set out in full in the appendix to appellant's jurisdictional statement herein filed, and we respectfully refer the Court thereto. However, none of the considerations which are relevant to the diverse venue prescribed with reference to certain causes of action and against certain classes of corporations have any application to the exceptional venue provision here challenged. That provision *baldly* classifies all corporations for purposes of venue, regardless of their character, or the character or extent of their business, and subjects them to more onerous venue than is provided with respect to individuals and partnerships, *solely because of their corporate character*. In cases, such as this, in which venue is controlled exclusively by the venue provision in question, the facts exclude every other condition under which a corporation may be sued in a county other than its domicile, and determine its liability to a more onerous venue solely because of its corporate character.

Contrary to the proposition announced in this case, based on the Snell case, this Court has definitely committed itself in the cases of *Truax vs. Corrigan*, 257 U. S. 312, *Kentucky Finance Corp. vs. Paramount Auto Exchange*, 262 U. S. 544, and *Power Manufacturing Co. vs. Saunders*, 274 U. S. 490, to the proposition that procedural statutes are within the reach of the Fourteenth Amendment. In the two cases last cited the Court is found definitely committed to the proposition that procedural statutes specifically relating to venue of actions "must be in keeping with the limitations which the Constitution of the United States places upon state action." In the Saunders case it was said:

> "Procedural statutes are not excepted, but must fall like others when in conflict with those limitations."

While we have undertaken the burden to show, and by argument believe we have shown, that there is nothing in the mere difference between individuals and corporations at all pertinent to justify a more onerous classification of the latter for purposes of venue, we believe the decisions of this Court properly understood require a complainant such as appellant only to make a *prima facie* case; that is, to establish the fact of discrimination and of probably injury resulting therefrom to the class of which it is a member. Thus in the Saunders case the fact of discrimination against and probable injury to foreign corporations was obvious, as the fact of discrimination against and probable injury to corporations as a class is obvious under our statute. Proceeding from that point the Court spoke with reference to the alleged basis for discrimination arising out of the difference between foreign corporations on the one hand and domestic corporations and individuals on the other as follows:

> "So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is not substantial difference. *The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any.* Of course, the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such ac-

> tions are affected, it is apparent that there is no more reason for a state-wide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary." (Italics ours).

While the decision in that case was limited to the precise question before it, we do not believe the Court intended to or could logically have so limited an application of the principles there announced. At least we are unable to conceive anything in the difference between corporations as a class and individuals which is at all pertinent to the consideration ordinarily affecting venue of actions, either from the standpoint of a plaintiff or a defendant; and we believe the language of the Court just quoted is as fully applicable to the question now before the Court as it was to the question there decided. In any event no distinguishing feature between the two situations has been pointed out or definitely suggested.

We now come to discuss the three recent cases by this Court adverted to in the opening paragraph of this petition, and to attempt to demonstrate that the views of the majority of the Court in each of those cases cannot be reconciled with the conclusions stated by the Court in its opinion in this case. Those cases are:

> Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389; Liggett Company vs. Baldridge, 278 U. S. 105; Frost vs. Corporation Commission of Oklahoma, 278 U. S. 515.

We discuss them in the order indicated. The opinion

of the Quaker City Cab Company case was by Mr. Justice Butler and was decided May 28, 1928. By statute of Pennsylvania a gross receipt tax was imposed upon all corporations owing and operating taxicabs. No similar or compensating tax was levied upon individuals or partnerships engaged in the same business. The Court said:

> "The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. Power Mfg. Co. vs. Saunders, supra. *No decision of this court gives support to such a classification. ..In no view can it be held to have more than an arbitrary basis.*" (Italics ours).

Mr. Justice Roberts, then at the bar, argued the case as he did the next one discussed, and it will be noted that Mr. Justice Holmes dissented from the opinion of the Court upon grounds indistinguishable from those upon which the opinion is based in this case.

The case of Liggett vs. Baldridge also involved a Pennsylvania statute which attempted to deny the privilege of ownership and operation of pharmacies to corporate owners. Clearly no business is more definitely related to the public interest than that of operating a drug store. It seems to us that if there is any conceivable business in which the mere difference between a cor-

porate and individual owner might be pertinent to or form the basis for a discriminating classification, it would be a business engaged in the sale of commodities intimately and constantly affecting the public health as are the commodities sold by drug stores. Yet in that case the Court definitely repudiated the view here announced in support of the decision, namely, that the difference alone between private and coroporate character does justify separate classification withdrawing from corporations as a class valuable rights accorded to private persons. Again it will be noted that the Court did not indicate that the complainant was required to show beyond doubt that the classification was unjustified; but the discrimination and probable injury being made to appear, rested its decision upon the fact that no evidence was presented by those seeking to sustain the statute that gave to it any character other than the apparent one of arbitrary discrimination. The Court simply held that the act created an unreasonable and unnecessary restriction upon lawful business because—

> "no facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. * * * * If detriment to the public health thereby has resulted or is threatened, *some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists.* The claim, *that mere ownership of a drug store* by one not a pharmacist bears a reasonable relation to the public health, finally *rests upon conjecture, unsupported by anything of substance.* This is not enough; and it becomes our duty to de-

clare the act assailed to be unconstitutional." (Italics ours.)

That opinion was rendered by Mr. Justice Sutherland November 19, 1928; and Mr. Justice Holmes dissented therefrom, giving expression to his well-known views that the Fourteenth Amendment should not be applied as a check upon state action to the extent that the Court there applied it.

The opinion in Frost vs. Oklahoma Corporation Commission was also by Mr. Justice Sutherland, and was rendered February 18, 1929. The situation there was that a corporation held to be one organized for profit, although it claimed to be a co-operative mutual benefit association, was relieved of certain burdens, requisite in the case of an individual, which enabled it to secure from the corporation commission a permit to erect and operate a cotton gin under conditions more favorable than those available to a private citizen. The Court pointed out that the only basis for the attempted classification was the mere difference between an individual and a corporation, saying:

> "As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, *notwithstanding the fact that both are doing the same business with the general public and to the same end*, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for

> his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. Power Mfg. Co. vs. Saunders, 274 U. S. 490, 493." (Italics ours.)

As we have pointed out above, a corporation in this state engaged in the identical business as an individual may be sued in a county other than that of its domicile, and where it has no agent or representative, but *where the cause of action arose merely because it is a corporation*, while an individual or partnership under the identical situation would be privileged to remove such suit to the county of the residence of the individual or to that of one or more of the partners. No reason has ever been suggested by appellees in the court below or here, nor has any reason been advanced by the Court, why the mere difference between an individual and a corporation is pertinent to the matter of venue of suits against the latter while such difference is not pertinent to the right of a corporation to own and operate drug stores, to operate taxicabs free of a tax not imposed upon individuals similarly situated, or to operate a cotton gin under conditions more favorable than those accorded to an individual. And we believe that no such reason has been pointed out for the single and simple reason that none such exists.

We come now to discuss the cases from several state jurisdictions cited by the Court as rendering "more probable" the reasonableness of the venue provision before the court. First, however, we desire again to point

out that the Court has never said the statute before it *is* reasonable, but only that it *may be* or probably is so; that the challenged statute is sustained alone upon conjecture. We shall not discuss the case of *Grayburg Oil Co. vs. Powell,* 118 Tex. 354, because it is obvious that the judgment here appealed from rests upon that decision by our state Supreme Court and everything here said in respect of the opinion of the Court of Civil Appeals applies with equal force thereto.

In *Lewis vs. South Pacific Coast R. Co.,* 66 Cal. 209, the California Supreme Court did sustain a provision of the California constitution somewhat similar to our venue provision here involved. The Court, however, apparently overlooks the fact that the case was expressly overruled by the same court in the later case of *Grocers' Fruit Growing Union vs. Kern County,* 150 Cal. 466, and overlooks also the fact that the later case was cited with apparent approval by this Court in Power Mfg. Co. vs. Saunders in support of its view that the statute there involved was unconstitutional. Reference to the later California case just cited discloses that the decision in the earlier case was based solely upon the proposition that a corporation was not a citizen of the United States within the Fourteenth Amendment. Fairness to the Court requires us to state, however, that the California Supreme Court in the still later case of *Cook vs. Ray Mfg. Co.,* 159 Cal. 694, again sustained the venue provision without, however, expressly overruling Fruit Growing Union vs. Kern County. The sole basis for the latter decision was that corporations organized subsequent to the effective date of the constitutional venue

provision involved had, by accepting their charters, impliedly assented to and were estopped to deny the validity of that provision. That argument will be dealt with at a subsequent point.

The case of *Central Georgia Power Co. vs. Stubbs*, 141 Ga. 172, dealt with the venue statute relating not to corporations as a class, but only to a restricted class of corporations engaged in the production, transmission and sale of electric power; and controlled the venue only of actions for injuries to the persons or property of litigants arising out of the acts of the company, its officers, agents or employees, in the county where the action was sought to be maintained. It related, therefore, to the venue not only of a restricted class of actions, but also to a restricted class of defendants. The Court characterized the statute as remedial (procedural) and not as one affecting substantial rights; and it may be assumed that such conclusion afforded the basis of that decision, because no other reason was advanced. The constitutional objection was simply overruled, but it is significant that the authorities relied on in support of that action were certain cases by the Supreme Court of Alabama. Reference to those cases discloses that a somewhat similar Alabama statute dealing with transitory actions against a restricted class of corporations was sustained upon the sole ground that procedural statutes were beyond the reach of the Fourteenth Amendment. In that respect the case of Truax vs. Corrigan and Power Mfg. Co. vs. Saunders, supra, each unquestionably cut the ground from under the Georgia decision cited by the Court. And the same criticism applies with

added force to the case of *Merrimac Veneer Co. vs. McCalip,* 129 Miss. 671, by the Mississippi Supreme Court, because that decision was expressly and unequivocally grounded upon the provision that a venue statute, even though invalid, was beyond the reach of the Fourteenth Amendment, because procedural in nature, and did not affect substantial rights of the litigants. That decision rests upon no other argument or proposition, and as authority it falls in the light of this Court's pronouncements to the contrary of the proposition there asserted.

The Missouri case of *Begley vs. Mississippi Valley Trust Co.,* 252 S. W. 84, sustained the validity of a statute similar to ours. When said decision was rendered, the Supreme Court of Missouri consisted of four judges and certain commissioners. The judges of the court were evenly divided, and the statute therefore sustained because the majority of the court were unwilling to overturn it. Again, however, we call attention to the fact that the Supreme Court of Missouri had in the earlier case of *McClung vs. Pulitzer Pub. Co.,* 279 Mo. 370, declared a similar statute relating to venue of libel actions to violate the equal protection clause of the Fourteenth Amendment; and again we call attention to the fact that the Missouri case last cited was also cited by this Court with apparent approval in the case of Power Mfg. Co. vs. Saunders in support of the unconstitutionality of the statute there involved. The judge who wrote the opinion in the McClung case dissented from the conclusion of the Court in the Begley case, as did another judge. That dissenting opinion and his earlier opinion in the McClung case demonstrate to

our minds the unquestionable invalidity of the statute before the Court. Finally, the validity of the Missouri statute was sustained upon the remarkable argument that, since the county where the cause of action arose might in a given case also be the county of the corporation's domicile or in which it had an agent or agency, it did not necessarily discriminate against corporations as a class. That argument avoids a decision of the very question before the court; for, admitting that in a given case more than one ground for venue against a corporation might exist under the Missouri statute as under ours, yet the effect of the statute as a discrimination against corporations as a class must be determined with reference to its operations in those cases where venue necessarily depends upon it, that is, in those cases where the corporation may be sued in a county where it is not domiciled and has no agency or representative, but simply because of its corporate character and the fact that the cause of action arose in the county where venue was sought to be maintained.

Lastly we come to consider the argument suggested by the California case of *Cook vs. Ray Mfg. Co.*, 159 Cal. 694, to the effect that corporations organized and accepting a charter when a constitutional provision or statute such as ours is in effect thereby impliedly assent to and are estopped to deny the validity thereof. That contention is wholly untenable, as this Court has vigorously pointed out on several occasions. Thus in *Cargill vs. Minnesota*, 180 U. S. 452, the State of Minnesota was undertaking to require appellant to secure a license from its railway and warehouse commission be-

fore operating or continuing to operate a grain elevator. Cargill resisted, contending among other things that if he applied for and accepted the license required by the statute, he would be estopped to question its validity. This Court denied that contention in the following language:

> "The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same.' Article 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state railroad and warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constition of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

The foregoing proposition was reaffirmed in the Saunders case, supra, 274 U. S. 490. The proposition so advanced by the Supreme Court of California but states the view held in some quarters that any legislative act

affecting corporations in force when a corporate charter is granted becomes a part of the so-called charter contract between the corporation thereby created and the state, and that the recipient of the license thus granted may not question the validity of the act which brings it into being. If a decision of this case must rest upon that principle, admittedly its application here will rest upon the declared law of the state of Texas on that subject, for what is or is not of the charter contract of a corporation is a question of local law which this Court will follow. The Supreme Court of Texas in *Life Association vs. Harris*, 94 Tex. 25, 57 S. W. 635, speaking with reference to what laws of a state are imported into and become a part of the so-called charter contract, made the following observation:

> "The statute seems to be simply a part of the laws of Pennsylvania regulating contracts of insurance and not one specially defining and limiting the powers of this corporation or of corporations generally. The rule is recognized that a corporation derives all its powers from the law which creates it and that its transactions, wherever they may occur, must be within the powers conferred by that law. This rule is generally held, however, to relate only to the charter of the corporation or to the law under which it is created and by which its powers are defined, *and not to general legislation of the State upon other subjects.* 2 Mora. on Corp., Secs. 967, 968, and cases cited." (Italics ours.)

It is true that the language just quoted is dictum. But it is nevertheless undoubedly the law in Texas on the subject, because the Supreme Court of the State has not otherwise spoken on the proposition and it finds sup-

port in the following authorities: 1 *Cook on Corporations,* Fifth Edition, Section 2; *Thompson on Corporations,* Second Edition, Vol. 1, Section 172; *Fletcher's Cyclopedia on Corporations,* Vol. 2, p. 1736, Section 765. And independently of anything the Texas Supreme Court has said on the subject, this Court has definitely stated the same views in two cases involving the same question with reference to what is or what is not of the charter contract of Texas corporations. See *Railroad Commissions vs. Eastern Texas R. Co.,* 264 U. S. at p. 867, and *T. & N. O. R. R. Co. vs. Miller,* 221 U. S. 406. And in *C. B. & Q. R. R. Co. vs. R. R. Com. of Wisconsin,* 237 U. S. 220, this Court definitely stated that it would not hold general legislative acts to be a part of the charter contract of a corporation unless the courts of that state should so hold; that is, that the question is one of local law concerning which this Court must follow the state courts.

We regret the length to which this argument has gone, but the decision to be finally rendered here is one of importance to the jurisprudence of this country as well as to the litigants. It is essential not only that the rights of litigants be rightly determined but that such rights be determined upon the application of correct principles of law. We earnestly submit that the Court's opinion in this case will not stand the test of comparison with its former very recent opinions involving the application of principles of law to facts which cannot be distinguished in principle from the facts of this case. We, therefore, most earnestly urge the Court to give consideration to the matters now urged in this petition for rehearing to the end, and in the sincere belief, that such consideration will ultimately lead to a reversal of the case, with which prayer this petition is most respectfully submitted.

Respectfully submitted,

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants.

CERTIFICATE

We, the undersigned, counsel for appellants in the above entitled and numbered cause, hereby each certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants.

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CHARLES ELMORE

No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

Appeal From the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

MOTION TO STAY MANDATE AND PRAYER FOR ORAL ARGUMENT In Connection With APPELLANTS' PETITION FOR REHEARING ON THE MERITS

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BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

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DAVE PINSON AND C. B. GUYGER,
Appellees

MOTION TO STAY MANDATE

To The Honorable Supreme Court of the United States:

Believing that the judgment of affirmance herein rendered on February 24th rests upon manifest errors prejudicial to their rights, appellants have filed herein their petition for rehearing on the merits in the belief that same should, and, upon reconsideration, will be granted for the reasons therein set out.

PRAYER FOR ORAL ARGUMENT

The Supreme Court of Texas, in compliance with a controlling statute, entered an ambiguous order on Bain Peanut Company's petition for writ of error below, which resulted in the case being dismissed for want of jurisdiction on original hearing. That circumstance was wholly beyond the control of these appellants. However, the court will recall, that circumstances required counsel to consume more than fifty minutes of oral

argument in discussing the question of jurisdiction. Thus counsel had no opportunity to argue the merits of this appeal orally. Such extended discussion of jurisdictional matters resulted not only from the form of the order by the Supreme Court of Texas, but also from the necessity of answering questions touching that subject propounded by members of the Court, which counsel was neither at liberty nor disposed to disregard. We sincerely believe that an oral argument on the merits, unhampered by technical jurisdictional considerations, will be of value to the Court in determining the petition for rehearing.

WHEREFORE, appellants earnestly pray:

1. That the Court do grant a stay of mandate until their petition for rehearing on the merits shall be finally disposed of; and

2. Either that the petition for rehearing be granted and the case be set down at a future date for oral argument on the merits, or that the petition for rehearing be set down for submission at a future date and that appellants be accorded the privilege of arguing same orally.

Respectfully submitted,

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants.

CERTIFICATE

We, the undersigned counsel for appellants, each severally certify that both appellants' petition for rehearing on the merits and this motion for stay of mandate and prayer for oral argument are filed in good faith and not for delay.

B. L. AGERTON,

B. G. MANSELL,

Counsel for Appellants.